UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 0:12-CV-60989-COHN/OTAZO-REYES

CITY OF DANIA BEACH, FLORIDA,
RAE SANDLER, and GRANT CAMPBELL,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant.

BROWARD COUNTY,

Intervenor.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs City of Dania Beach ("City" or "Dania Beach"), Rae Sandler, and Grant Campbell (collectively, "Plaintiffs") hereby move for summary judgment. For the reasons set forth in the incorporated memorandum, there are no genuine issues of material fact in dispute and Plaintiffs are entitled to judgment as a matter of law.

INTRODUCTION

This is a case about the U.S. Army Corps of Engineers' (the "Corps") failure to consider and disclose all of the environmental impacts of its decision to issue a Clean Water Act ("CWA") § 404 permit authorizing the extension of a runway at the Fort Lauderdale-Hollywood International Airport (the "Airport"). The National Environmental Policy At ("NEPA"), 42 U.S.C. § 4332(2), requires the Corps to take a "hard look" at the environmental impacts of its permit decisions, and to disclose those impacts to the public before issuing permits. The CWA regulations governing issuance of § 404 permits, 33 CFR § 320.4(a)(1), require the Corps to weigh all of the benefits and detriments of a project in determining whether issuance of a permit is in the public interest.

In 2011, the Corps was provided with a momentous new report from the World Health Organization linking high noise levels generated at airports to cardiovascular disease and cognitive impairment in children. In any other permit context, such information would be one of the most important impacts for the Corps to weigh and disclose, because it raises the question of whether the project will threaten public health and safety. *See, e.g., Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1357, 1361 (11th Cir. 2008) (litigation over limestone mining permits, where potential for contamination of drinking water wellfield was central issue for agency consideration). In this case, however, the Corps completely ignored it, refusing to even look at noise impacts in its short Environmental Assessment and failing to consider potential risks to public health in making its "public interest" determination. The Environmental Impact Statement ("EIS") prepared by the Federal Aviation Administration ("FAA"), which was adopted by the Corps, also did not discuss the public health effects of noise, but instead discussed only how noise has the potential to annoy people.

If the agencies had taken a hard look at this information, they would have either discussed those health effects in their NEPA documents and disclosed them to the public; or they would have explained why they believed the new World Health Organization report to be incorrect, or identified mitigation measures which would eliminate the health threat. This is the approach the Corps has taken to similar issues with other projects. *See, e.g.*, Corps, Final Supplemental EIS on Rock Mining in the Lake Belt Region of Miami-Dade County, Florida, at 4-58 to 4-68 (2009) (discussing science related to potential public health risk from groundwater contamination), *available at* www.lakebeltseis.com. The fact that the agencies did neither in this case, and simply ignored an issue which is too big to ignore, demonstrates that they failed to take the hard look required by law. The result is that senior Corps decisionmakers – and the public at large – were not aware that the project might result in health risks for thousands of people when they decided that issuing the permit was in the public interest. The agencies also never considered those health risks when they developed and reviewed potential mitigation measures for the project, such as noise-reducing flight restrictions or expanded residential noise mitigation programs. This is a clear violation of NEPA and the CWA regulations, and the Court should remand the permit back to the Corps for further consideration.

I. FACTUAL BACKGROUND

A. The Proposal to Expand the Ft. Lauderdale-Hollywood International Airport's South Runway

At issue in this case is the Corps' permit to fill wetlands east of U.S. Highway 1 for the 8,000-foot expansion of Runway 9R-27L on the south side of the Airport (the "South Runway"). Administrative Record[1] Entry 05136 (hereinafter "AR____"), AR21665. Extending the South Runway over U.S Highway 1 would impose greatly increased noise levels onto residential neighborhoods south, southeast, and southwest of the Airport. AR05669, AR05680. By 2020, more than five hundred flights are projected to use the extended South Runway each day, with large and heavy jets coming every four minutes between the hours of 7:00 am and 10:00 pm. AR05677, AR01325-01326. More than 1,050 homes, with more than 2,470 residents, are in neighborhoods most impacted by the extended South Runway. AR05680.

Two federal agencies conducted environmental reviews of the runway-extension proposal pursuant to the NEPA. AR06128-06129. The first federal agency to review the proposal was the FAA, which prepared an Environmental Impact Statement. Id. The FAA recognized early on in the process that the Corps would need to issue a CWA § 404 permit for the runway to be expanded, AR05130, AR05142-AR05143, but it never invited the Corps to be a "cooperating" agency on its EIS. AR05142, AR00013-00020, AR00360, AR21671.

B. FAA's Review of Noise Impacts from the Project

The FAA issued its final Environmental Impact Statement in June 2008 ("2008 EIS"). AR60217. Among the topics addressed in the 2008 EIS were noise impacts and environmental health and safety risks to children. AR05505-05506. The 2008 EIS estimated noise levels from the extended South Runway using FAA's standard methodology. AR05305-05308. That methodology projects noise levels based on the DNL metric, which is the day-night average sound level expressed in weighted decibels. AR05305. Using those projections as a basis, the FAA then evaluated the impacts of different DNL levels on people using an "annoyance" scale, measuring "the general reaction of [a] population to noise that generates speech interference (including inability to use the telephone, radio, television, or recordings satisfactorily), sleep

[1] The Corps provided an administrative record which it certified "constitute[s] a true and complete copy of the set of the documents that the decision-maker considered in making the Permit Decision." D.E. 39, at 4 ¶3.

disturbance, or simply interferes with the desire for a tranquil environment." AR05306. The annoyance scale specifically evaluates "the percentage of the exposed population expected to be Highly Annoyed" by the noise levels. Id.

Besides looking at subjective annoyance reaction levels of noise, the FAA also used the DNL scale as a basis for determining land use compatibility with noise. See 14 C.F.R. Part 150, App. A, Table 1. The FAA's Part 150 land use compatibility table provides that areas exposed to noise levels above 65 DNL are "incompatible" with residential uses for purposes of FAA funding of noise mitigation programs. 14 C.F.R. Part 150, App. A, Table 1; see also AR05302. The FAA compiled that table based exclusively on the annoyance curve. 46 Fed. Reg. 81316, 8325-26 (Jan. 26, 1981) ("the values given . . . are based on studies of noise-induced annoyance"); see also AR05306 ("FAA land use compatibility recommendations are based upon the analysis of the relationship of [exposed population expected to be highly annoyed] to DNL noise levels"). Thus the basis for all noise impacts identified in the 2008 EIS, including land use compatibility and sleep, speech and tranquility disturbance, is how annoyed people are by noise levels. See id.

The 2008 EIS did not discuss or mention the possible public health impacts of increased noise, including increased risk of cardiovascular disease and cognitive impairment of children. See generally AR05611-05765. The 2008 EIS did have a section on general risks to children's health. AR05909. There, the FAA spent less than a half a page and concluded that, "implementation of the runway development alternatives would not result in the release of or exposure to significant levels of harmful agents in the water, air, or soil that would affect children's health or safety," without mentioning the potential health effects of high noise levels on children. Id.

C. **The FAA's Review of Public Health Impacts From Increased Noise Levels**

Because of the omissions in the 2008 EIS, the City asked the FAA to consider the potential adverse health impacts caused by exposure to high noise levels from the project. AR17569-17575. In support, the City provided the FAA with several scientific papers linking chronic exposure to high noise levels with cardiovascular disease, hypertension, and cognitive impairment in children. Id. The City was not alone: the U.S. Environmental Protection Agency ("EPA") also commented that the 2008 EIS did not consider the impact of aircraft noise exposure on children's health. AR06609.

Neither EPA's nor the City's comments, however, caused the FAA to revise the discussion of noise impacts in the EIS. Id.; AR04874. In a response to Plaintiffs' comments included in an appendix to the final EIS, the FAA stated only that it had used its standard methodology from FAA guidance, which (as discussed above) focuses not on physical health impacts from noise but rather on annoyance stemming from noise. AR04874. Nowhere did it indicate that there were no health effects from high noise exposures; that the agency's annoyance-based methodology took into account such health effects; that these effects would be avoided by the noise mitigation program proposed by Broward County; or that the scientific papers provided by Plaintiffs were incorrect. Id. In response to EPA's comments, the FAA claimed that it disclosed the health impacts on children in its noise analysis, stating it "assumed that there were no schools or noise sensitive facilities frequented by children in the immediate project area," AR06609 (emphasis added), but did not disclose how many children live in the area and ignored its own acknowledgement in the 2008 EIS that the runway expansion would result in four schools being located in the 60 to 65 DNL noise contour in 2020.[2] AR0568.

D. The FAA's Record of Decision

In December 2008, the FAA issued a Record of Decision ("ROD") approving the South Runway extension pursuant to its aviation authorities. AR06336-06337. In the ROD, the FAA did not acknowledge that the South Runway extension could increase the incidence of cardiovascular disease and cognitive impairment of children among people living near the Airport. Id. Dania Beach challenged the FAA's ROD in the D.C. Circuit on grounds that it violated statutes governing Department of Transportation approvals of airport and transportation projects, 49 U.S.C. § 47106(c)(1)(B) and § 303(c), and Executive Order 11,990, 42 Fed. Reg. 26,961 (May 24, 1977), which governs federal assistance for construction in wetlands. In December 2010, the D.C. Circuit ruled for the FAA in a 2-1 decision. City of Dania Beach v. FAA, 628 F.3d 581 (D.C. Cir. 2010); AR13198-13226.

E. The Corps' Permit Review

Broward County applied to the Corps for the Clean Water Act permit in December 2010. AR10822. A Corps permit is required for the project to go forward, because the project extends

[2] This is not the first time that the FAA has refused to consider the impacts of aircraft overflights at the Airport. In 2007, the FAA was found to have violated NEPA when it changed runway procedures at the Airport but refused to look at noise impacts on local residents. City of Dania Beach v. FAA, 485 F.3d 1181 (D.C. Cir. 2007).

WHITE & CASE LLP Wachovia Financial Center, Miami, Florida 33131-2352 Tel + 1 305 371 2700

the South Runway into wetlands east of U.S. Highway 1. AR05143; AR05806-5807; AR21664. On March 1, 2011, the Corps issued a public notice of its intent to issue a permit, and invited public comment. AR13365-13389. That public notice failed to identify as an issue the potential public health impacts of increased noise from the project. Id.

In response to the Corps' public notice, Plaintiffs raised their concerns about the effects of high noise exposure on the health of local residents, and asked the Corps to analyze this issue. AR17464-17845. Approximately 169 other local residents and organizations joined Plaintiffs in asking the Court for a public hearing. AR17920.

In particular, the City provided a newly-issued 2011 report by the World Health Organization on the "Burden of disease from environmental noise: Quantification of healthy life years lost in Europe" ("2011 WHO Report"). AR17576-17700. The World Health Organization is a branch of the United Nations which provides technical and scientific information on public health issues to governments around the world. See http://www.who.int/about/en/. The 2011 WHO Report synthesizes "evidence on the relationship between environmental noise and specific health effects, including cardiovascular disease, cognitive impairment, sleep disturbance, and tinnitus." AR17581. Unlike the studies before the 2011 WHO Report, the WHO Report is written to assist policy-makers "in quantifying the health impact of environmental noise," AR17583, is based on a "state-of-the-art" methods and peer review "regarding the exposure data, exposure-response relationships, outcome" and other factors, AR17604, and provides, for the first time, a "synthesized review of evidence on the relationship between environmental noise and health effects," and "exemplary estimates on the health impacts of environmental noise based on exposure-response relationships[.]" AR17595.

Based on its review of scientific literature, the 2011 WHO Report concluded "[t]here is overwhelming evidence that exposure to environmental noise has adverse effects on the health of the population." AR17698 (emphasis added). It further found that "well-designed, powerful epidemiological studies have found cardiovascular disease to be consistently associated with exposure to environmental noise," AR17594 (emphasis added), and that "[r]eliable evidence indicates the adverse effects of chronic noise exposure on children's cognition[.]" AR17645. The 2011 WHO Report estimates that 20% of children ages 7 to 19 who are exposed to aircraft noise levels between 55 and 65 DNL per year will develop a noise-induced cognitive impairment of some kind. AR17643.

After receiving the 2011 WHO Report from Plaintiffs, the Corps issued a revised Public Notice on May 31, 2011. AR19488-19524. Despite knowledge of the possible negative health impacts to residents surrounding the Airport, the revised Public Notice failed to apprise the public of its rationale for ignoring those impacts and failed to disclose documents that would allegedly support the Corps' complete disregard for those impacts. See id.

The administrative record reveals that after the Corps received the 2011 WHO Report, there were no internal discussions -- at all -- regarding its content or implications for the Corps' permit decision. The Corps did not send the 2011 WHO Report to the EPA or Department of Health and Human Services for their comment. The only thing the Corps did was send Plaintiffs' letter to the FAA for comment. AR17919; AR18682. The FAA sent a letter back to the Corps in which it dismissed the City's concerns and stated that the "aircraft noise assessment [in the 2008 EIS] was prepared using the methodologies and significance criteria provided in FAA orders." AR21333. The Corps' record is utterly silent on the health issue after the FAA letter: nothing in the record shows any internal discussion of the FAA letter, indicates that the Corps independently evaluated the FAA's assertions, or otherwise determined that the public health issues previously had been addressed and disclosed to the public. AR17919, AR21331-21224. The Corps also never held a public hearing to discuss the public health issue with the City and the local residents who will be affected.

In October 2011, the Corps issued a Memorandum for Record/Statement of Findings ("2011 MFR/EA"), AR21664-21737, followed shortly thereafter by its permit for the South Runway extension. AR21745-21789. The 2011 MFR/EA was the Corps' Environmental Assessment prepared to comply with NEPA. AR21664. In the 2011 MFR/EA, the Corps limited its scope of review to "impacts to jurisdictional wetlands," because, according to the Corps, "[t]he project is . . . under the purview of the FAA." AR21671. Due to this self-imposed limitation, the Corps refused to even consider the secondary and cumulative public health impacts of noise stemming from the operation of the extended runway, stating that "[i]ssues outside the Corps' purview include lifestyle impacts, noise impacts." AR21701. The Corps incorporated by reference the 2008 EIS, the 2008 FAA ROD, and a 2011 FAA Written Re-evaluation of the 2008 EIS (which did not address the public health issue). AR21664. The Corps claimed that the City's concerns regarding health impacts of high noise were "addressed" in the 2008 EIS and 2008 FAA ROD, but did not explain how it was addressed. AR2172. Nowhere

did the Corps discuss whether or not the 2011 WHO Report merited a Supplemental EIS.

The same day it issued the 2011 MFR/EA, the Corps sent letters to people who responded to its public notices, notifying them that the Corps was denying their requests for a public hearing. E.g. AR21576-78. The letters did not mention the public health issue, and they contained language lifted verbatim from FAA's response to the City's comment letter that the 2008 EIS' notice assessment was prepared using the methodologies and significance criteria provided in FAA Orders. Compare AR21577 (Corps letter to commenters) with AR21333 (FAA letter to Corps).

The Corps' 2011 MFR/EA included a section on the "public interest" review required by 33 CFR § 320.4(a)(1), where it discussed the expected benefits and detriments of the project. AR21714-21718. In evaluating the benefits, the Corps looked broadly at the benefits derived from operation of the extended South Runway, finding that the project would be "beneficial" to the needs and welfare of the people because the project "provides for an increased transportation efficiency and safety for the people that use the Fort Lauderdale Airport." AR21714; AR21718. By contrast, in evaluating the detriments, the Corps looked only at the impacts of filling the wetlands under the eastern part of the extended runway, and did not consider any detriments that would result from operation of the runway, such as potential risks to local residents' health and children's cognitive impairment that live, work, and go to school around the Airport that could result from high noise levels generated by the project. See generally AR21714-21718.

Nowhere in the 2011 MFR/EA did the Corps acknowledge that the South Runway extension could increase the incidence of cardiovascular disease of people or the cognitive impairment of children living near the flight path. AR21664-21737. Nowhere in the 2011 MFR/EA did the Corps conclude that those health impacts could be avoided by the limited noise mitigation measures approved by the FAA. Id. Nothing in the record indicates that senior Corps decisionmakers were made aware of this public health issue. The net result is that the Corps never considered or disclosed to the public how its decision to issue a permit authorizing the South Runway extension could put at risk the health of thousands of nearby residents.

II. STANDARD OF REVIEW

Judicial review of Plaintiffs' NEPA and CWA claims is governed by the Administrative Procedure Act (the "APA"). See Sierra Club, 526 F.3d at 1360 ("The APA provides for judicial review of agency decisions like the Corps' decision to grant CWA permits . . . and the Corps'

NEPA decisions during the permitting process."). Under the APA, courts "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation of its decision that runs counter to the evidence before the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1264 (11th Cir. 2009) (internal citations omitted). In evaluating an agency's NEPA compliance in particular, the reviewing court must assure itself that the agency took "a 'hard look' at the environmental consequences, Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97-98 (1983) (internal citation omitted), and "adequately considered and disclosed" those consequences, before acting, id.

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is appropriate in APA cases, because the Court reviews the challenged agency action based on an administrative record.[3] Sunshine Co. Food Distrib., Inc. v. U.S. Citizenship & Immigration Servs., No. 09-

[3] Plaintiffs all have standing to sue. Plaintiffs Rae Sandler and Grant Campbell will be subjected to higher noise levels from the expanded South Runway, which have been linked to the adverse health effects at issue, because they live in the areas of Dania Beach that will be most impacted. D.E. 4, Attachment 21, ¶ 2, 8-14 (Decl. of Rae Sandler); D.E. 4, Attachment 27, ¶¶ 2, 6, 8-13 (Decl. of Grant Campbell). Direct exposure to such airport noise levels, which should have been better analyzed by the agency, is a sufficient injury for standing in a case involving procedural statutes such as NEPA. City of Dania Beach, 485 F.3d at 1185-87 (having "little difficulty" in finding Dania Beach residents to have suffered injury-in-fact based risk of higher noise levels due to inadequate NEPA compliance). The City also will suffer injury to its own interests as a City, because the Airport project will reduce its tax base (directly and indirectly) and increase the amount of services it will need to provide to its residents. D.E. 4, Attachment 23, ¶¶ 1, 5-6, 8, 11 (Decl. of Anne Castro); see City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-99 (9th Cir. 2004) (noting that "[t]he 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets" and finding Article III standing where a city manager declared that a plan would, among other things, "impair and impede use of streets for fire, police and other emergency services"). The D.C. Circuit already has decided that the City and affected residents have standing to challenge approvals for the Airport project. City of Dania Beach v. FAA, 628 F.3d 581, 584-86 (D.C. Cir. 2010) (holding that City of Dania Beach and plaintiff residents had standing to challenge FAA approvals for the Airport project). If the Court finds that one party has standing, the court "need not consider

11688, 2010 WL 145102, at *4 (11th Cir. Jan. 15, 2010).

III. ARGUMENT

A. The Corps Violated NEPA By Failing to Take A Hard Look at the Impact of High Noise Levels on the Public Health of Residents Living Near the Expanded South Runway

1. NEPA Requires All Federal Agencies to Consider the Environmental Consequences of Their Actions.

NEPA, 42 U.S.C. §§ 4321-4370f, is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It requires federal agencies to take environmental considerations into account in their decision-making "to the fullest extent possible" and to disclose those impacts to the public. 42 U.S.C. § 4332; 40 C.F.R. § 1500.2; Baltimore Gas & Elec. Co., 462 U.S. at 96 ("The key requirement of NEPA, however, is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process . . . brings those effects to bear on decisions to take particular actions that significantly affect the environment."). Federal agencies do this by taking a "hard look" at environmental concerns in an EIS. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989).

When multiple federal agencies review a project, each agency has an independent duty to comply with NEPA. Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1519 (10th Cir. 1992) (finding that cooperating agency still has obligation to comply with NEPA before issuing a permit under its jurisdiction). NEPA regulations encourage agencies to work together on evaluations of projects, and avoid duplication of effort. See e.g., 40 C.F.R. § 1506.3. To that end, agencies "shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21. However, an agency must ensure that whenever it incorporates materials by reference that those materials, in conjunction with the agency's own analysis, still fulfill the agency's NEPA obligations. City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 95 F.3d 892 (9th Cir. 1996) (concluding that despite a deficient incorporation by reference, the EIS/R still failed to properly analyze cumulative impacts because the referenced EIR was not sufficient on its own to satisfy the requirements of the law), aff'd in relevant part by City of

---

whether the other . . . plaintiffs have standing to maintain the suit." Horne v. Flores, 557 U.S. 443, 446-47 (2009).

Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1161 (9th Cir. 1997).

NEPA regulations also allow two agencies with independent authority on the same project to work together on the preparation of NEPA documents. 40 C.F.R. § 1501.6. One agency, the "lead agency," must invite the other agency "with jurisdiction by law or special expertise" to participate in the project as a "cooperating agency." Id. Each of the agencies continue to have independent responsibilities to comply with NEPA, Holy Cross Wilderness Fund, 960 F.2d at 1519, but this process allows for "agency cooperation early in the process." Id.

The Vision-100 Century of Aviation Reauthorization Act (the "Vision-100 Act"), 49 U.S.C. § 47171, et. seq., also contemplates coordination between the FAA and other agencies on "airport capacity enhancement projects at congested airports." 49 U.S.C. § 47171(a). Under the Act, the FAA must identify as early as possible other Federal agencies "that may have jurisdiction over environmental-related matters that may be affected by the project[,]" and enter into a memorandum of understanding with those agencies. Id. at § 47171(d) -(f). For all projects coordinated under the Vision-100 Act, the FAA is the lead agency, responsible for, among other things, "defining the scope and content of the environmental impact statement," consistent with CEQ regulations. Id. at § 47171(h). Because the FAA is the lead agency, any other Federal agency "participating in a coordinated environmental review process under this section shall give substantial deference, to the extent consistent with applicable law and policy, to the aviation expertise of" the FAA. Id. (emphasis added).

Neither the Vision-100 Act nor NEPA allows an agency to evade its NEPA obligations under the shield of "cooperation" or "participation." See e.g., Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026, 18035 (March 23, 1981) ("A cooperating agency . . . has an independent legal obligation to comply with NEPA.").[4] All agencies evaluating a project have an obligation to comply with NEPA and ensure that accurate and complete information is conveyed to decision-makers and the public. Save the Bay, Inc. v. U.S. Army Corps of Eng'rs, 610 F.2d 322, 325-26 (5th Cir. 1980) ("Perhaps the most basic requirement of NEPA is that all federal agencies make an Independent environmental assessment

[4] The CEQ's "Forty Questions" document is persuasive authority offering interpretative guidance on the meaning of NEPA and its implementing regulations. Wyo. v. U.S. Dept. of Agric., 661 F. 3d 1209, 1260 (10th Cir. 2011).

of the proposed action.").[5]

2. The Corps Did Not Take a Hard Look at the Public Health Issue

The administrative record reveals that the Corps never took a hard look at the public health effects of the high noise levels that will be generated by the project. The Corps was provided with a 2011 report, from an authoritative source (the World Health Organization), indicating that high noise levels generated by airports are linked to increased incidence of cardiovascular disease and cognitive impairment in children. After the Corps received it, the Corps never had any internal discussions regarding the report or the public health issues raised in it. Nowhere in the Corps' NEPA document, the 2011 MFR/EA, did the Corps discuss or disclose whether or not the South Runway project would result in those public health effects. By entirely failing to consider this important issue, the Corps was arbitrary and capricious in its NEPA compliance. See City of Oxford, Ga. v. F.A.A., 428 F.3d 1346, 1352 (11th Cir. 2005).

a. The Corps Improperly Limited Its Scope of Analysis to the Filling of Wetlands Rather Than the Entire South Runway Project

The Corps failed to evaluate this public health issue because it improperly limited its scope of analysis to the direct impacts of filling the wetlands under the eastern half of the extended South Runway. The Corps' regulations provide that a NEPA analysis should "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review." 33 C.F.R. Part 325, App. B § 7(b)(1). The Corps has "sufficient control" for portions of the project beyond the filling of wetlands "where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." Id. at § 7(b)(2)(A) (emphasis added). If the waters under the Corps' jurisdiction must be affected to fulfill the project's goals, the Corps should analyze the effects of the entire project. Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005). The cases applying this regulation distinguish between projects that cannot go forward without a Corps permit, where the agency must consider all impacts from the overall project, and projects where the overall project can go forward without a Corps permit,

[5] Decisions of the former United States Court of Appeals for the Fifth Circuit decided before October 1, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

where the Corps can limit the analysis to specific activities authorized by its permit. Compare Stewart v. Potts, 996 F. Supp. 668, 683 (S.D. Tex. 1998) (finding that whenever a project could not be completed but-for the filling of the wetlands "and the tasks necessary to accomplish it are so interrelated and functionally interdependent," that the entire project – and not just the filling of the wetlands – comes "within the jurisdiction of the Corps."); White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033, 1041 (9th Cir. 2009) ("[i]t is not the quantity of waters that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals"), with Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105,1117 (9th Cir. 2000) ("It appears that the project certainly could proceed without the permit.") (emphasis in original), abrogated on other grounds, Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1178 (9th Cir. 2011); Save the Bay v. U.S. Army Corps of Eng'rs, 610 F.2d 322, 327 (5th Cir. 1980) ("In this case, the pipeline itself was not a necessity for operation of the plant. At least one alternative method, not requiring any Corps permit, was available to Dupont."); Sierra Club v. U.S. Army Corps of Eng'rs, 450 F. Supp. 2d 503, 518 (D. N.J. 2006).

In this case, the Corps' permit is a necessary precondition to the South Runway's extension, as the runway can only be extended into wetlands east of the Airport if the Corps authorizes the filling of those wetlands. AR05143; AR05806-5807; AR21664. This means that the Corps had an obligation to look at the environmental impacts resulting from operation of the extended South Runway, because the project cannot be built without a Corps permit. See Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1121 (9th Cir. 2005) ("it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility."). Moreover, the FAA defined the scope of NEPA analysis to include impacts from operation of the completed runway, and under the Vision-100 Act, the Corps had to defer to that decision. 49 U.S.C. § 47171(h). The Corps' refusal to consider impacts other than those directly associated with filling wetlands violated NEPA.

b. The Corps Violated NEPA By Failing to Consider All Reasonably Foreseeable Cumulative and Secondary Impacts from the Project

Even assuming that the Corps properly limited its scope of analysis to the filling of wetlands, the Corps still violated NEPA by not evaluating all reasonably foreseeable secondary and cumulative impacts of its permit decision. NEPA requires the Corps to examine secondary

(or indirect) impacts, i.e, impacts "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R. § 1508.8, and cumulative impacts, i.e., impacts "on the environment which result[] from the incremental action of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions," 40 C.F.R. § 1508.7. The Corps must consider the cumulative and secondary impacts of its permit decision even if it limits the scope of analysis. See U.S. Army Corps of Engineers, Environmental Quality; Procedures for Implementing the National Environmental Policy Act, 53 Fed. Reg. 3120-01, 3122 (Feb. 3, 1988) ("Whatever portion of the project we choose to cover in the scope of analysis, that analysis will include all direct, indirect, and cumulative impacts.").

In this case, among the secondary and cumulative impacts from the filling of the wetlands is the possible public health impacts – including cardiovascular disease and cognitive impairment of children – stemming from increased noise resulting from the use of the expanded South Runway. The Corps itself conceded that a secondary impact from filling the wetlands stems "from aircraft activity." AR19831; see also AR18678-AR18679. When combined with the runway extension – an obviously foreseeable action – public health impacts from that increased aircraft activity may occur.

Despite this concession, nowhere in the Corps' MFR/EA did the Corps analyze or evaluate the impacts of increased noise from airplanes using the expanded South Runway on the health of residents surrounding the Airport. AR21664-21737. Indeed, the Corps specifically stated that "noise impacts" were an issue "outside the Corps purview," AR21701, and failed to mention public health impacts or noise impacts from the project at all in its "Cumulative & Secondary Impacts" section. AR21721-21722. Because the Corps failed to evaluate the indirect and cumulative impacts of aircraft noise on the public health of residents surrounding the Airport, the Corps' NEPA analysis fails as arbitrary, capricious, and an abuse of discretion. See Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 997 (9th Cir. 2004).

3. The Corps Cannot Defend Its NEPA Analysis on the Basis that It Incorporated By Reference the FAA's Inadequate Cumulative and Secondary Impacts Analysis

Instead of taking its obligation to review all of the cumulative and secondary impacts from the project seriously, however, the Corps took a backseat in its review and simply "incorporated by reference" the FAA's entire analysis without independently determining that

the analysis satisfied NEPA. That incorporation by reference does not cure the Corps' deficient cumulative and secondary impacts analysis, because the FAA itself never analyzed or evaluated the impact of noise on the public health of residents.

NEPA regulations allow a federal agency to incorporate by reference another federal agency's environmental review of a particular project into its own evaluation of that same project. 40 C.F.R. § 1502.21. In particular, an agency may incorporate material by reference when "the effects will be to cut down on bulk without impeding agency and public review of the action." Id. However, the incorporating agency has an independent duty to ensure that materials it incorporates or adopts satisfy NEPA. See Anacostia Watershed Soc'y v. Babbitt, 871 F. Supp. 475, 485 (D.D.C. 1994) (agency must "independently review the [EIS] to ascertain that it is current and that it satisfies the agency's own NEPA procedures."); Cal. Native Plant Soc'y v. U.S. Envtl. Prot. Agency, No. C06-03604 MJJ, 2007 WL 2021796, at *18 (N.D. Cal. July 10, 2007) ("[t]he Corps may incorporate information by reference, but it must still engage in an independent analysis of the information"). Moreover, to the extent that material being incorporated by an agency is deficient under NEPA, the incorporating agency cannot rely on that material to cure its own deficient NEPA analysis. See Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1030-1031 (2d Cir. 1983) (finding Corps' reliance on inadequate FEIS violated NEPA); Fund for Animals v. Hall, 448 F. Supp. 2d 127, 136-37 (D.D.C. 2006) (finding agency could not rely on deficient cumulative impacts analysis in an incorporated document to satisfy its own NEPA obligations).

The Corps' 2011 MFR/EA incorporated by reference the 2008 EIS, the 2008 ROD, and other FAA materials. AR21664. In the "Cumulative & Secondary Impacts" section of the 2011 MFR/EA, the Corps specifically incorporated Chapter 7 of the 2008 EIS "for Cumulative Impacts Discussion." AR21721. Chapter 7 of the 2008 EIS, however, did not mention or discuss the cumulative impacts associated with the public health impacts from operating the extended South Runway. AR06017-06056. The discussion of noise impacts from the South Runway expansion project in Chapters 5 and 6 of the 2008 EIS merely discussed noise as an "annoyance," and focused on how particular noise levels would interfere with sleep and speech and potentially cause hearing loss. AR05302-05308, AR05611-05765. Indeed, nowhere in the body of the 2008 EIS was there a discussion of the public health impacts, such as cardiovascular disease and cognitive impairment in children, to residents stemming from the increased noise.

See id.

The only place the 2008 EIS even mentioned the public health impacts of noise was in response to Plaintiffs' comment on the issue. AR04874. There, however, the FAA dismissed the Plaintiffs' comments by referring to its accepted noise methodology that addresses the impacts of noise based on an annoyance scale and does not account in any way for public health impacts. See id. Trying to argue that this methodology for evaluating aircraft noise and land use compatibility somehow also addresses public health impacts is like trying to fit a square peg into a round hole – it simply does not fit, because it does not address the issue raised in the 2011 WHO Report. While it may have been proper for the 2008 EIS to use that methodology for the purpose it was designed to address (determining whether noise levels will subjectively annoy people), it was arbitrary and capricious to rely on that methodology to resolve an issue it does not even address (the capacity of noise to cause cardiovascular disease and cognitive impairment in children). Cf. Chem. Mfrs. Ass'n v. EPA, 28 F.3d 1259, 1265 (D.C. Cir. 1994) (holding it was arbitrary for agency to rely on model where there was no rational relationship between the model and the behavior it was measuring); Allison v. Dept. of Transp., 908 F.2d 1024, 1029 (D.C. Cir. 1990) (arbitrary and capricious for FAA to rely on noise methodology to determine impacts in nature preserve when the methodology was formulated to assess people's reaction to noise in different contexts).

Even to the extent the Court is persuaded that the FAA's conclusory response to Plaintiffs' comment letter concerning public health impacts is an "analysis" of the public health issues, that analysis does not fulfill the "hard look" requirements of NEPA. Or. Natural Res. Council Fund v. Goodman, 505 F.3d 884, 893 (9th Cir. 2007) ("We have repeatedly explained that generalized, conclusory assertions from agency experts are not sufficient[.]"). The possibility that increased aircraft noise from the project could lead to heart attacks and cognitive impairment in children is quite startling on its face. The "hard look" standard requires more than a mere dismissal of such a potentially harmful impact. See Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 537 (8th Cir. 2004) (responses insufficient where agency failed to consider the substantive points made in comment). If the Corps had truly taken a "hard look" at the issue like it now claims, it would have had some analysis either (1) explaining why the 2011 WHO Report (and other studies) were unreliable or inaccurate; or (2) disclosing the possible health impacts to residents from the increased noise and discussing how to best mitigate

those impacts. Neither was done here.[6] Accordingly, the Corps did not fulfill its "hard look" requirement under NEPA by summarily dismissing Plaintiffs' comments regarding the possibly severe health impacts that could stem from the project. See Sierra, 701 F.2d at 1030-1031 (finding Corps' reliance on inadequate FEIS, which purported to respond to comments made but performed no new studies or additional analyses of the issue, violated NEPA).

The Corps cannot thus rely on its incorporation to cure its own deficient NEPA analysis of cumulative and secondary impacts, as the FAA's analysis does not provide such a cure, rendering the Corps' analysis arbitrary, capricious, and an abuse of discretion. See Pennaco Energy, Inc. v. U.S. Dep't of Interior, 377 F.3d 1147, 1160 (10th Cir. 2004) (finding that incorporated document that did not address a particular scenario did not adequately supplement an EIS on that issue); Fund for Animal, 448 F. Supp. 2d at 135-36 (finding that material incorporated into EA did not cure deficient NEPA analysis of environmental impacts).

4. The Corps Cannot Defend Its Inadequate NEPA Analysis On The Basis That It Deferred to the FAA's Expertise

The Corps also cannot argue that it fulfilled its NEPA obligation by deferring to the FAA on the issue of public health impacts from noise. The Vision-100 Act requires an agency to defer to another agency, or expert, on areas within their expertise. 49 U.S.C. § 47171(h). That deference, however, is not unlimited. The Vision-100 Act specifically contemplates that the coordinating agency gives substantial deference "to the aviation expertise of the" FAA "to the extent consistent with applicable law and policy." Id. (emphasis added). As discussed above, applicable NEPA law requires that the Corps independently satisfy itself that all issues have received a hard look.

The FAA, however, is not the agency with "special expertise" on the health impacts of noise. The controlling regulations applying NEPA are those issued by the President's Council on Environmental Quality ("CEQ"). 40 CFR Part 1500; Defenders of Wildlife, Earth Island Inst. v. Hogarth, 330 F.3d 1358, 1369 (Fed. Cir. 2003) ("CEQ promulgated regulations for implementing NEPA . . . are binding on all agencies."). The appendices to the CEQ regulations provide that the Department of Health and Human Services, and not the FAA, is the agency with

[6] Even though the Court may not second-guess the Corps' model of scientific evaluation or theory, the Corps must apply some type of scientific evaluation or theory before the Court can get to the point of even deferring to the Corps' model. Without any evaluation, such deference is inappropriate.

"jurisdiction by law or special expertise" on the topic of "effects of noise on health," the specific topic at issue here. National Environmental Policy Act (NEPA) Implementation Procedures; Appendices I, II, and III, 49 Fed. Reg. 49750, 49577 (Dec. 21, 1984). Moreover, the EPA, and not the FAA, has set standards for noise effects on human health, including issuing the "Levels" guidance that the FAA relied on in evaluating land use compatibility here. See e.g., 42 U.S.C. § 4903(c)(2) ("If at any time the Administrator [of the EPA]has reason to believe that a standard or regulation, or any proposed standard or regulation, of any Federal agency respecting noise does not protect the public health and welfare to the extent he believes to be required and feasible, he may request such agency to review and report to him on the advisability of revising such standard or regulation to provide such protection."); AR05306. Although the FAA does have some expertise on noise, that expertise is limited to calculating the amount of aircraft noise and "aircraft noise and land use compatibility," and is inapplicable to the analysis of impacts to residents' cardiovascular health and their children's cognitive health, the specific topics that both the FAA and the Corps failed to analyze. See id. It is startling even to suggest that a transportation agency is the federal government's expert on public health. The FAA's analysis of noise impacts in the 2008 EIS focuses exclusively on the amount of noise that will be generated by the project, and on how aircraft noise would be compatible with existing land uses around the Airport based on an annoyance scale. AR05302-05308, AR05611-05765. Accordingly, under the Vision-100 Act, the FAA is not the correct agency to give substantial deference to on the public health impacts from increased noise from the extended South Runway. See id.; see also H.R. Rep. No. 109-240 (2003) (Conf. Rep.) ("Other agencies have expertise in determining the environmental impacts of transportation projects, and the Secretary should rely on the expertise of those agencies in analyzing those impacts.") (emphasis added).

Even assuming the Corps could defer to the FAA on this issue under the Vision-100 Act, deference is inappropriate here where the FAA never used its "expertise" to analyze the cumulative or secondary impacts of noise on the health of residents. The controlling precedent in the Eleventh Circuit indicates that deference cannot be blind acceptance of another agency's conclusions. See Save the Bay, 610 F.2d at 325-26 (deference "should not be understood as allowing the Corps to base their determination solely on the comments of other agencies" because agencies must "make an [i]ndependent environmental assessment of the proposed action"). The administrative record contains no document indicating that Corps personnel ever

even discussed or considered whether the FAA's analysis of noise impacts addressed the risk of cardiovascular disease or cognitive impairment in children. The only Corps' documents addressing noise impacts are proverbial rubber stamps: the 2011 MFR/EA which just wholesale incorporates the FAA documents, and the Corps' form letter to public commenters on the permit, which lifts verbatim a portion of the FAA's response to the Plaintiffs' comment letter. AR21702; AR21694-21695; AR21577; AR21333. "[T]he Corps [is not allowed] to base their determination solely on the comments of other agencies." Save the Bay, 611 F.2d at 325-26.

Here, it can hardly be said the Corps reasonably deferred to the FAA's non-existent analysis of public health impacts to residents surrounding the Airport as a justification for its own non-existent compliance with NEPA. Accordingly, the Corps' cumulative and secondary impacts analysis is arbitrary, capricious, an abuse of discretion, and fails to comply with NEPA.

5. **The Corps Cannot Avoid its NEPA Obligations Simply Because the FAA was the Lead Agency**

The Corps' NEPA obligation did not change simply because the Corps was coordinating with the FAA in a streamlined review of the proposed project. See Holy Cross Wilderness Fund, 960 F.2d at 1519 (finding that cooperating agency still has obligation to comply with NEPA before issuing a permit under its jurisdiction); Sierra Club v. Clinton, 689 F. Supp. 2d 1123, 1143 (D. Minn. 2010) ("A cooperating agency must, however, make an independent determination as to whether the EIS satisfies its own NEPA obligations"); see also 46 Fed. Reg. at 18035 ("A cooperating agency with jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA.") (emphasis added). No case, to Plaintiffs' knowledge, has ever held that an agency need not fully comply with NEPA by virtue of the fact that it is not the lead agency on a project.

A review of the administrative record here makes clear that the Corps was not a cooperating agency of the FAA on the South Runway expansion project. The FAA never invited the Corps to be a cooperating agency, and the FAA stated in the record that the Corps was "not a cooperating agency on this EIS." AR00360. Moreover, in the 2011 MFR/EA, the Corps refers to itself as a "participating agency," AR21671, a term absent from NEPA and its regulations. The Corps, however, did enter into a "Memorandum of Understanding" ("MOU") with the FAA under the Vision-100 Act in which they agreed to work together on permitting issues for the South Runway Expansion. AR00014 –00020. That MOU provides, among other things, that

nothing in it "is intended or shall be interpreted to diminish, modify, or affect the statutory or regulatory authorities or responsibilities of any Party during its review and evaluation of required permit . . . applications," AR00239, and focuses on the Corps' role with respect to FAA's review of the project, without limiting the Corps' review of any permit application submitted to it. Since the agencies agreed during the administrative process that their cooperation did not change their obligations under NEPA, the Corps is in no position today to argue the opposite.

6. The Corps Violated NEPA By Failing to Prepare a Supplemental EIS

Independent of the sufficiency of the 2011 MFR/EA and 2008 EIS, the Corps violated NEPA by failing to prepare a Supplemental EIS. A Supplemental EIS is required if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). This means that "[i]f there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect[] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." Marsh, 490 U.S. at 374. The Eleventh Circuit has made clear that deciding whether or not to prepare a Supplemental EIS is a distinct NEPA obligation for agencies:

> In some cases, after an agency publishes ... an EIS, but before any action is taken, ... the agency receives additional information. In that situation, the agency must make an additional NEPA determination: the agency must determine whether ... the information reveals significant effects on the quality of the human environment not previously considered. If new, significant effects are shown, the agency must prepare an SEIS.

Sierra Club, 526 F.3d at 1360 (internal citations omitted). "[C]ourts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information." Marsh, 490 U.S. at 378.

The Corps failed to make a reasoned decision not to prepare a supplemental EIS. Here, the Plaintiffs submitted a new authoritative analysis of the public health impacts of noise – the 2011 WHO Report – to the Corps, and asked the Corps to consider the public health impacts of aircraft noise on residents surrounding the Airport. AR17464-17845, AR17576-17700. The 2011 WHO Report presented a significantly new picture of the public health impacts of noise. In

particular, the WHO Report synthesized the other individual studies done on the topic, peer-reviewed those studies, and gave "exemplary estimates on the health impacts of environmental noise based on exposure-response relationships[.]" AR17595. Although Plaintiffs previously submitted other individual studies to the FAA on the issue (which the FAA ignored), the 2008 EIS did not discuss the possibility that the runway extension could result in an elevated incidence of cardiovascular disease and cognitive impairment in children. Moreover, in determining whether the 2011 WHO Report is "new" information, the question is not whether Plaintiffs raised the health issue before, but whether the 2008 EIS actually considered and discussed how the expansion could cause adverse health impacts on local residents (which it did not). Marsh, 490 U.S. at 371, 374; see also Leavenworth Audubon Adopt-A-Forest Alpine Lakes Prot. Soc'y v. Ferraro, 881 F. Supp. 1482, 1491 (W.D. Wash. 1995) (reversing agency's decision to reject report with most credible scientific information on a particular topic when such information was never discussed or considered by agency).

The Corps was arbitrary and capricious in not preparing a Supplemental EIS in the face of the 2011 WHO Report. The Corps summarily dismissed Plaintiffs concerns, claiming the "impacts of aircraft noise exposure on populations, including children, are adequately discussed in the FEIS[,]" even though the public health risks were never analyzed or disclosed in the 2008 EIS. Moreover, the Corps made a factual error when it asserted that "there are no schools or noise sensitive public facilities frequented by children in the immediate project area." AR21333. Although the 2008 EIS does not identify the number of children living around the Airport, it reveals there are at least four schools in the extended South Runway's 60-65 DNL noise contours in the year 2020. AR0568. The 2011 WHO Report indicates that 20% of children ages 7-19 who experience average aircraft noise levels between 55 and 65 DNL a year will develop noise-induced cognitive impairment of some kind. AR17643. Thus, children in schools – and who live – around the Airport might experience some cognitive impairment from the extended South Runway. But, that possibility was never disclosed or analyzed by the Corps.

In addition, the Corps was arbitrary and capricious in its failure to specifically analyze or discuss whether the public health issues warranted a Supplemental EIS. The Corps had an obligation to make a specific determination whether or not the 2011 WHO Report required preparation of a Supplemental EIS. Nowhere did the Corps acknowledge or evaluate the 2011 WHO Report, or its significance. AR2172. Nowhere did the Corps discuss whether the 2011

WHO Report constituted new information, whether the specific public health issue was taken into account by the FAA's standard methodology based on annoyance, or whether a Supplemental EIS was required. The Corps' summary dismissal of new information with the most recent credible scientific information on public health impacts of noise, without considering or discussing the significance of the 2011 WHO Report "lacks the 'careful scientific analysis' required by NEPA." Leavenworth Audubon, 881 F. Supp. at 1491 (rejecting agency's dismissal of new most credible scientific information as insignificant merely because it had not been adopted as a "management direction" of the agency); Ass'n Concerned About Tomorrow, Inc. (ACT) v. Dole, 610 F. Supp. 1101, 1114 (N.D. Tex. 1985) ("significant new information and changes in the quality of the noise impact . . . necessitated supplementation of the EIS").

B. The Corps Violated the Clean Water Act

1. The Corps Violated the Public Interest Review Requirement By Failing to Consider All Impacts From the Project

The Corps also was arbitrary and capricious in determining that its CWA § 404 permit was in the public interest, when it did not weigh the potential for the project to affect public health. Before the Corps can issue a permit, its regulations require it to determine that issuing the permit will not "be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). In making that determination, the Corps must balance the "benefits which reasonably may be expected to accrue from the proposal" against "its reasonably foreseeable detriments." Id. "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case." 33 C.F.R. § 320.4(a)(1). "All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof..." Id.; Envtl. Coal. of Broward Cnty. v. Myers, 831 F.2d 984, 986 (11th Cir. 1987) (Corps public interest review upheld where "the Corps considered all relevant factors" and credible evidence supported its action). In performing this balancing the Corps must consider impacts on "general environmental concerns . . . safety, . . . and, in general, the needs and welfare of the people[,]" among others. Id.; see also Gouger v. U.S. Army Corps of Eng'rs, 779 F.Supp.2d 588, 613-14 (S.D. Tex. 2011) ("The Corps regulations require, *inter alia*, a 'public interest' review, which in turn requires a review of 'cumulative impacts.'").

In this case, the Corps did not properly weigh all detriments and benefits of the project when making its public interest determination. First, the Corps did not consider all relevant

factors, because it did not address the potential for the Airport project to harm the health of thousands of local residents. Nowhere in the public interest determination did the Corps acknowledge that the project could increase risks of cardiovascular disease or cognitive impairment in children. AR21718. While the Corps could have determined that the economic benefits of the runway extension to the local economy outweigh those public health risks, the agency could not have done that where it did not consider the health risks at all.

Second, the Corps was arbitrary in how it weighed the benefits and detriments of the project. The Corps considered the benefits of operation of the extended South Runway, finding that the project "provides for an increased transportation efficiency and safety for the people that use the Fort Lauderdale Airport." AR21714, AR21718. On the other hand, the Corps refused to consider the detriments from operation of the extended runway, and only considered the detriments of filling the wetlands under the runway's eastern end. See AR21671. This means that the Corps balanced the various factors using an improperly weighted scale.

Because the Corps failed to consider relevant factors in its review, it could not properly have balanced the project's benefits against its reasonably foreseeable detriments. 33 C.F.R. § 320.4(a)(1). Nw. Bypass Grp. v. U.S. Army Corps of Eng'rs, 470 F. Supp. 2d 30, 50 (D. N.H. 2007) ("What is important for measuring the Corps' [public interest] decision against the arbitrary and capricious standard is whether the Corps performed an analysis and took into account the appropriate factors."). Thus, the Corps' public interest review was arbitrary, capricious, and an abuse of discretion.

2. The Corps Also Violated the Public Participation Requirements of the CWA

Under the CWA and its implementing regulations, when the Corps has received a permit application, it must issue a public notice soliciting comments. 33 U.S.C. § 1344(a); 33 C.F.R. §§ 325.2(a), 325.3. Because the notice is the "primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the possible impact on the public interest," the notice must include "all available information which may assist interested parties in evaluating the likely impact of the proposed activity." 33 C.F.R. § 325(a)(13) (emphasis added); id. at § 325.3(a) (notice must provide sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment."). As explained by one recent court, when a public

notice fails to provide any substantive information on a key issue, it also "fails to provide an accurate picture of the Corps' reasoning and prevent[s] useful criticism on the part of Plaintiffs and on the part of the public in general." Ohio Valley Envt'l Coal. v. U.S. Army Corps of Eng'rs, 674 F.Supp.2d 783, 794 (S.D. W. Va. 2009). As a result, the public notice "deprive[s] Plaintiffs of an existing procedural right – the right to comment intelligently." Id.

In this case, the Corps violated its obligation to provide adequate public notice and comment. The Corps issued its first public notice for the project on March 1, 2011, and a revised public notice on May 31, 2011. AR13365-13389; AR19488-19524. Before the Corps issued the revised public notice, however, Plaintiffs submitted the 2011 WHO Report to the Corps and raised concerns about the health impacts from noise on residents surrounding the Airport. Rather than providing all "available information which may assist interested parties in evaluating the likely impact of the proposed activity, 33 C.F.R. 325.3(a)(13), neither of the public notices provided any information as to likely secondary and cumulative health impacts resulting from the proposed activity. If the Corps had done so, there would have been even more of an outpouring of concern by members of the public.

Furthermore, much of the information on which the Corps relied in making its permitting decision in the ROD – including information allegedly supporting its decision to ignore the health impacts from increased noise – was never made available for comment. The Corps' main justification in the ROD for refusing to consider the public health impacts from increased noise is a document it received from the FAA, AR21331-21334, in August 2011 – more than five months after the initial public notice and more than a month after the close of the comment period. AR19528. A public notice that contains no information on an area of critical concern to the public along with the Corps' decision to hide key documents from public review and comment, render the Corps' compliance with its public participation requirement of the CWA arbitrary, capricious, and an abuse of discretion. See e.g., Nat'l Wildlife Fed'n v. Marsh, 568 F. Supp. 985, 994 (D.D.C. 1983) ("the Court finds that the inclusion of the [document] in the administrative record after the close of the comment and hearing period had the effect of shielding the essential data and the agency's rationale from public hearing and comment.") (emphasis in original).

IV. REMEDIES

The Corps' violation of NEPA and the Clean Water Act means that the permit should be

remanded to the agency for further consideration. Sierra Club, 526 F.3d at 1369. The normal course also would be to vacate the permit. See id. Even remand without vacatur of the permit could help avoid or remedy the harms to Dania Beach and its residents caused by the Corps' violation of the law. The Corps has the authority to place conditions on its Clean Water Act permit to address environmental impacts identified in its permit review. 33 C.F.R. § 325.4(a) ("District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement."). Based on a hard look at the public health effects, the Corps could evaluate whether the existing noise mitigation program is sufficient to address the public health effects of the expanded South Runway; no agency has evaluated that issue to date. The Corps also could require that Broward County implement additional measures to protect Dania Beach residents from high noise levels, such as expanded noise mitigation measures that would sound insulate more affected residents' homes. Such measures could help local residents even if runway construction proceeds and the expanded South Runway operates as planned.

V. CONCLUSION

Plaintiffs respectfully request that the Court reverse and remand the Corps § 404 Clean Water Act permit for the Corps to analyze the public health impacts to residents surrounding the Airport from the increased aircraft noise emitting from the proposed extended South Runway.

Respectfully submitted,

By: _____

T. Neal McAliley
Florida Bar No. 172091
Angela F. Benjamin
Florida Bar No. 015914
White & Case LLP
Wachovia Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, FL 33131-2352
Tel: (305) 371-2700
Fax: (305) 358-5744
Email: nmcaliley@whitecase.com
Email: abenjamin@whitecase.com
Attorneys for Plaintiffs

Of Counsel
Thomas J. Ansbro
Florida Bar No. 187513
City Attorney
City of Dania Beach
100 West Dania Beach Boulevard
Dania Beach FL 33004
Tel: (954) 924-6800
Fax: (954) 921-2604
Email: tansbro@ci.dania-beach.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of October, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: Angela Benjamin

SERVICE LIST

C. Scott Spear
Trial Attorney
Ignacia S. Moreno
Assistant Attorney General
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: (202) 305-1597
Facsimile: (202) 616-2426
Email: scott.spear@usdoj.gov

Attorneys for Defendant U.S. Army Corps of Engineers

Reuben S. Schifman
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-4224
Facsimile: (202) 305-0506
Email: reuben.schifman@usdoj.gov

Attorneys for Defendant U.S. Army Corps of Engineers

Michelle Diffenderfer
Robert P. Diffenderfer
Lewis, Longman & Walker, P.A.
515 North Flagler Drive, Suite 1500
West Palm Beach, FL 33401
Telephone: (561) 640-0820
Facsimile (561) 640-8202
Email: mdiffenderfer@llw-law.com
Email: rdiffenderfer@llw-law.com

Attorneys for Defendant-Intervenor Broward County

Edwin A. Steinmeyer
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301
Telephone: (850) 222-5702
Facsimile: (850) 224-9242
Email: esteinmeyer@llw-law.com

Attorneys for Defendant-Intervenor Broward County

Joni Armstrong Coffey
County Attorney for Broward County
Tony J. Rodriguez, Assistant County Attorney
115 South Andrews Avenue
Governmental Center, Suite 423
Fort Lauderdale, FL 33301
Telephone: (954) 357-7600
Facsimile: (954) 357-7641
Email: jacoffey@broward.org
Email: trodriguez@broward.org

Attorneys for Defendant-Intervenor Broward County